



THE METHODOLOGY OF APPLYING THE PRINCIPLES OF FAIRNESS IN HEARING: A REVIEW OF PAST AND PRESENT APPROACHES

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ABSTRACT

The nature of applying fairness in hearing is not the same in different societies. In Islamic societies, fairness is part of the spiritual character in a person. In religious contexts, there is a close relationship between fairness and ethics. But, in European and American law and other sciences, the concept of fairness has focused on the structure of the process, which consists of two parts: the stages of the process and the degrees of the process. In Islamic societies, the rules are originated from the divine source; however, in other societies, they are based on the human decisions that are adopted by the competent authorities. Also, there is no matter what these rules are opposite of the religious rules, and the judge is not obliged to consider them. If the rules are violated in the religious societies, the qualified judge tries to repeal them, rather than ordering these rules.

KEYWORDS: Fair; Hearing; European human rights; Islamic jurisprudence; Method; Principle; Rule.

INTRODUCTION:

Fairness:

The term "fairness" means justice and equality. Nevertheless, it seems that there are some differences between justice and fairness. Fairness refers to equality in emotional affairs;

Whereas, justice covers the rights in all affairs including emotional and non-emotional affairs.¹ Fairness means that a person considers all humans' rights like himself and he should behave others as he likes the others behave towards him.

METHODS OF FAIRNESS:

In Iranian Judicial Law and Procedure:

In Iranian law and statute, fairness is not used as the legal rule. Some of the characteristics of fairness in Iranian law consist of:

- i. Establishing discipline and regulating the social relationships.
- ii. It is permanent and does not depend of the specific condition.
- iii. It has the social concept.
- iv. It is compulsory.
- v. It is enacted by the accepted and competent persons.
- vi. It is guaranteed to be conducted by the state.

In Islamic Jurisprudence:

Apart from that fairness is the jurisprudent rule, it has two meanings: One is equality, and the other is to observe conscience and ethics in a case. Equity is different from justice, Juristic preference and unspecified public interest, the observance of fairness are known as good ethics and its ignorance is the inherent evil.

The principle of fairness could be proved based on verses, Sunnah, narrations, the Imams' deeds, and the wise' quotes. The principle of fairness means to consider the conditions and verdict based on them. In jurisprudence, fairness is beyond equality, so that equality may be sacrificed to preserve fairness. Preserving fairness is compulsory when justice results in the undesirable outcome.

- i. The principle of fairness is a general rule in judgment process.
- ii. The principle of fairness must be based on the Islamic jurisprudence.
- iii. It guarantees the compulsory order.

The jurisprudent documents are as follow:

- i. Verses: Al-Nal, verse 90: "Indeed, Allah orders justice and good conduct and giving to Relatives";
- ii. Sunnah: It includes the Imams' deeds and speech.
- iii. Fairness in Nahj al-Balagha:

CHARACTERISTICS OF FAIRNESS:

Fairness as a legal principle has the following characteristics:

Judging by an Impartial Observer:

The judge must preserve the principle of justice among the parties as far as possible to be impartial in judging. One of the most important results of impartiality is the judge's moral persuasion that should be achieved in his last investigation based on the reasons and pieces of evidence in the proceeding.²

The law and conscience are dominated. However, justice is as the criteria for the judge, law, and statute, the public disapproval of judicial system is a warning for it.

The Fair Hearing vs. the Legal Hearing:

"The rules of criminal procedure reject this theory that the goal justifies the means and the judicial authorities are not restricted in protecting social security".³ Therefore, in Describing the rules of criminal procedure, fairness has been always referred, and fair criminal proceedings are known as various aspects of defense rights.

Fair Hearing in Ancient Times:

The law of Hammurabi is regarded as one of the historical veins of ancient times in protecting people from arbitrary harassment and punishment.

In Greece and Rome, Executions without conviction and punishment without hearing were considered unlawful.⁴

In ancient Greek thought and Roman tradition, there were some themes near to the ethical concepts underlying today's accepted principles of "fair hearing" or "observance of the Rule of law". The duty to hear the parties' statements and the opportunity to defend the accused, to bring a rehearing and so on.

Fair Hearing in Islam:

Hearing and judgment based on justice is the goal of all religions that are emphasized By Judaism and Christianity. The most important principles of fair proceeding include Judge's independence and impartiality, monitoring the good conduct of the proceedings, principle of legality of offenses and punishments, the principle of permission, the principle of equality, the principle of publicity, and the principle of permission.

Islam has the most acceptable definition of justice and fairness. In Islamic law, justice is a general principle that the rules must be evaluated based on them, it means the religious order is fair.

Accordingly, the principle of justice is one of the principles of Shiite. According to Islam, the goals of judgment are realized through fairly investigation and judgment that the right of both parties is preserved.

According to the Holy Quran, the main goal is to create and develop judicial security in society. Judicial security refers to the protection and immunity of lives, property, and honor and dignity, liberty, housing, and occupation of individuals from violations of law. Some religious scholars have said in the definition of judicial rights: The judge should order what is fair, not what the people expect from

hearing."

Islamic jurisprudence is an independent system based on human personality and Dignity. The teachings of Imam Ali (PBUH), which have been recorded as valid documents of a fair hearing in the history of humanity, have always been based on scientific and rational standards.

Fair Hearing in the European Court of Human Rights:

The European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950, and its protocols, is a regional document in the Council of Europe's area of human rights. The Convention provides for a transnational court to monitor the performance of member states.

According to the judicial procedure, the definition of fair hearing is mixed, it can be broken down into different components.⁵

The statistics of the European Court of Human Rights shows that "today, more than Half of the European Court of Human Rights concern complaints about Article 6, breaching the conditions, and guarantees of a fair hearing".⁶

PROCEDURES TO ENSURE FAIR HEARING:

Governments are committed to ensuring the right to a fair hearing for individuals in a variety of ways, including legislation and the provision of effective enforcement mechanisms.

In Jurisprudential Thought:

Judgment is a position that is valuable in all societies. In Islamic jurisprudence, the Position of judge is specific that requires some qualifications.

i. The priority of internal control (faith) over external control:

In jurisprudence thought, internal control over external control is prioritized. This is stated in the book, tradition and consensus. The jurists have referred to some reasons to prove these qualifications that are studied in the following:

- a. *Quran*: Allah gives the disbelievers over the believers a way [to overcome them];⁷
- b. *Sunnah*: Imam Ali (Peace be upon him): "Refer to those who narrate our orders and Hadith because they are our proofs, and we are the God's proof". This indicated the faith as a qualification for judgment, since being as proof is not granted the wrongdoer, faith is its qualification.
- c. *Consensus*: The agreement and consensus of jurists is as important as faith in the Judge position. As the wrongdoer is not qualified for testimony, he cannot judge.⁸

ii. Difficult qualifications for the judicial appointments:

Being Knowledgeable:

One of the qualifications of a judge in knowledge; knowledge, in the jurists' viewpoint, is *ijtihad*. According to the jurists, there are many verses and narrations that prove the validity of *ijtihad* as a qualification for the judge.

Spiritual Qualifications (Piety and Good Deeds):

The other qualification for judgment is piety and good deed. According to the jurists, piety means to refuse deadly sin and not to insist on venial sin.⁹

Physical and Mental Health:

Physical and mental health are the other qualifications. For example, vision is one of the important qualifications. Of course, vision is restricted to cases where the dispute is settled only by looking.

CONCLUSION:

Although Europe moved toward secularism and movement of Christianity and Church Since Renaissance, the legal effects of this transformation that leads to the International Covenant on Civil and Political Rights in 1966 indicate that this document was influenced by religious teachings.

Some philosophers such as Plato and Aristotle have revived the methods of fairness in the rulers' behavior with people, giving the right to the person who is entitled is defined as fairness.

According to Islamic jurisprudence, fairness depends on the person's degree of theology. It means that whatever the person is aware of Islamic sciences, he acts based on it.

He fairly judges based on divine attributes. In other words, the fair human is the person who his acts are the same as his knowledge. Thus, the ignorance person could not be fair;

Accordingly, as Islam has ordered, the judge must be knowledgeable.

If the judge is ignorant, he cannot be appointed to this position; therefore, he cannot judge fairly.

Accordingly, there is no general definition for fairness, as a part of fairness is hidden inside the person and the other part is evident on his acts and words.

However, fairness is spiritual and internal, the effects of fairness are visible by people.

Actually, there is no specified definition for fairness, as any definition of fairness would be restricted, fairness is also different in each person; so there is no specific order for it

Because determining border avoids its promotion. Ethics is progressive.

He would judge fairly, as fairness is its requirement. According to Islam, fairness is necessary for developing the human's capacity. It is not only necessary in judgment but also in all affairs.

According to what has been mentioned above, the fair and unfair acts and behaviors could be distinguished; however, according to its nature, it is difficult, even impossible, to be divided and specified.

In other words, the methods of fairness are equal to the human population, the degree of fairness also depends on his knowledge and character; generally, fairness is nothing rather than truth and honesty.

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